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IN THE

Supreme Court of The United States

OCTOBER TERM, 1931.

NO. 258

CENTRAL PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Petitioners and Appellants below,*

vs.

COUNTY OF ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the Board of Supervisors of said County, JOHN DOE CORPORATION, RICHARD ROE CORPORATION, JOHN SMITH, THOMAS BROWN, JAMES COE, JOSEPH HOE, EDWARD POE, ROBERT CROW and FREDERICK STOW, *Respondents and Respondents below.*

RESPONDENTS' BRIEF ON THE MERITS ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

I. THE FACTS

The facts upon which this litigation depends are set forth clearly, fairly and comprehensively in the opinion of the California Supreme Court (R., pp. 119-123, fol. 188-191, 81 Cal. Dec. 653-6, 299 Pac. 75-77). Consequently, and pursuant to the rule of this court (Supreme Court Rule 27, subd. 3), no further statement thereof is regarded necessary except to supply a deficiency in Petitioners' Brief.

In their statement of "The Facts" (Br., pp. 5-8),

petitioners have omitted all reference to the topographic conditions upon which respondent's case rests. And further, in the course of their argument (Br., p. 35) they advance the claim that it is not the fact that "the topography of Niles Canyon offers any serious obstacle to modern highway construction."

It is deemed necessary, therefore, to refer here to those portions of the Record portraying the rather unique geographical conditions which form the basis of respondents' claim to the occupation and use of a portion of the railroads' right of way for its public highway.

The trial court found (Finding No. V, R. 29, fol. 50) that the topographical, geographical and other physical features existing in the disputed portions of the right of way thru Niles Canyon,

> "viz: the narrowness of the canyon, proximity of Alameda Creek which in the winter season becomes a torrential stream sometimes capable of destroying bridges and roadways, and the steep sides of the canyon make it practically necessary to maintain the highway through the disputed territory because of the overwhelming difficulties to substitute a different route in those places where the road is within the 200 foot limit from the center line of main track of railroad."

It was further found that since 1911; respondent County has expended more than $100,000 for improvements and maintenance of the road (R., pp. 29, 30, fol.

51); and it is then concluded that the said highway "is necessary for public accommodation". (R., p. 30, fol. 51).

These findings are amply supported by the record. The difficulties incident to construction of a road outside the railroad right of way are depicted in the testimony of Mr. Posey, respondents' engineer (R., p. 85, fol. 134, et seq.). He stated in substance that while a road can be built most anywhere, steep hillsides, requiring lengthy cuts, long slopes, heavy embankments and many curves, resulting in slides, falling debris, settling, and damp surfaces, rendered the project in this instance "possible but not feasible" (R., p. 87, fol. 137). He further pointed out that the nearest alternative route would be approximately fifty per cent longer (R., p. 87, fol. 138). Moreover, that if the road were shifted entirely to the north side of the railroad, people on the south side of the canyon would have no way out and "probably would have to have two roads to allow people on both sides to go out." (R. p. 88, fol. 139). His rough estimate of the cost of a road up the canyon and outside the right of way, exculsive of bridges; was $125,000 for a gravel road (R. p. 89, fol. 141). Besides the financing of such a road, the element of safety to the public is a contributing factor rendering the project not feasible. (R. p. 95, fol. 149).

A glance at the Uuited States Geological Survey

topographic sheet of the Pleasanton Quadrangle, Defendants' Exhibit D, (inserted R. p. 84A, fol. 132a) shows that the floor of the canyon is in the neighborhood of 250 feet in elevation; that the walls are precipitous and rise to heights of 500, 750, 1000 and 1150 feet in a very short distance and to 1500 and 1660 feet further back.

Petitioners (Brief, pp. 7, 8) make light of the testimony of witnesses who stated they traveled the road thru Niles Canyon prior to the coming of the railroad, and wind up their presentation of the facts by a reference to that portion of Finding V of the trial court (R. p. 29, fol. 50) which declares that it cannot now be ascertained whether the 1859 survey is identical in any particular with the present highway. However, a preceding portion of the same finding reads (R. p. 29, fol. 49):

> ". . .that for more than sixty years there has existed with the knowledge of plaintiffs and their predecessors a highway for ordinary vehicular travel through Niles Canyon; but the said highway did not exist throughout in its present location hereinabove particularly described prior to March 27, 1911, but that these parts of the old road No. 247 not expressly abandoned by the Board of Supervisors on said date and now included within the limits of County road No. 4974, are a part of the present traveled road; . . . ."

The proceedings establishing the original road, designated County road No. 247, are set forth in the Re-

cord (pp. 61-2). The Board of Supervisors, after petition, survey and other preliminaries, on May 3, 1859, adopted the route and declared it a public highway, (R. p. 62, fol. 100) and the trial court so found (R. p. 29, fol. 49).

At that time the land involved was unappropriated public land of the United States (R. p. 27, fol. 46); and thereafter predecessors of petitioners acquired their right of way by the Act of Congress of July 1st, 1862, 12 Stat. 489 (R. p. 26, fol. 45). The railroad was actually constructed thru Niles Canyon in the years 1867 and 1868 (R. p. 27, fol. 46).

II. THE ISSUE

Petitioners state (Brief, p. 4) that the issue is merely one of title and right of possession, as to which of the parties has the superior right and control. Respondents insist that there is no question of superior right, the only question being whether the county has acquired an easement. A more accurate statement of the issue would be:

Can a railroad company, holding its right of way by virtue of a Congressional grant as a public trust, oust the public from the use thereof in disregard of the rights and conveniences of the latter, and this after sixty years of unmolested occupation by the public, which possession and use antedates that of the railroad,

where the public has expended considerable sums for construction, improvement and maintenance, and where the granting power in the first instance has expressly restricted the grant to provide for precisely such a public necessity as is presented here?

SUMMARY OF THE ARGUMENT

It is respondents' position that the County of Alameda established its highway in 1859, approximately eight years before the advent of the railroad, and has ever since been in continuous, uninterrupted and unmolested use of the same under a claim of right; that the Act of Congress of July 1, 1862 (12 Stat. 489) was not intended to interfere with the use of public roads, but, as affirmatively appears from later enactments and by judicial construction, was designed to further the public interest in respect to highways; that specifically, the Act of March 3, 1875 (18 Stat. 482), makes provision for joint use by railroads and public highways of canyons too narrow for the exclusive occupation of a 400 foot railroad right of way; that Congress at all times retained the power to alter, modify or qualify the title formerly conveyed in a manner not inconsistent with the use of the rights of way for railroad purposes; that independent of statute, the county, in the exercise of the police power of the state, might condemn unused portions of the right of way where the topographical conditions and the need warrants it; that neither Congress nor the Federal Courts have ever denied this

right, but, on the contrary, have so assumed; that the right to condemn existing, long adverse user on the part of the public will have the same result; that the requisite necessity has been shown in this case, with the result that the possession of the county has long since ripened into an easement.

Taking up the argument in the order followed in petitioners' Brief, the following propositions are urged:

1. Neither Congress, by the Act of July 1, 1862, nor the State of California, in urging and confirming the Congressional grant, contemplated the ousting of the public from highways already established.

2. The Act of July 1, 1862, (12 Stat. 489) was not an unqualified grant vesting a title wholly beyond the power of Congress to modify, and the railroad holds subject to the conditions of the Act of March 3, 1875.

3. The title of the railroad derived from the Act of July 1, 1862, is subject to public rights obtained through adverse user commensurate with the police power of the State.

4. The highway involved was established and has been in use since 1859; the necessity therefor is established; the United States Supreme Court will not undertake to examine a local question upon which the State Court has spoken.

ARGUMENT

I.

Neither Congress, by the Act of July 1, 1862, nor the State of California, in urging and confirming the Congressional grant, contemplated the ousting of the public from highways already established.

It is contended (Brief, pp. 11-15) that respondent County, being a political subdivision of the State of California, cannot be heard "in repudiation" of the acts of May 1, 1852 (Calif. Stat. 1852, p. 150) and April 4, 1864 (Calif. Stat. 1863-1864, p. 471), wherein the State Legislature first memorialized Congress to grant a right of way through the State for a transcontinental railroad, and later confirmed the grant.

If this argument were carried to its logical conclusion, these enactments would be construed as a renouncement of all local authority in or over the rights of way to be thereafter selected, and a veritable Chinese wall would have been authorized across the State. To give such effect to the Act of July 1, 1862, would surely be inconsistent with the purpose of the grant, since it was intended "to promote the public interest and welfare."

Neither Congress nor the State Legislature contemplated the taking of property already devoted to a public use. It would be manifestly absurd to say that the State, in urging and thereafter approving the grant in question, had any thought of thereby authorizing the

ousting of the public from its public highways if the grantee happened to select its route along them. Granting the urgent political and economic necessity existing at the time of these enactments, the State cannot be said to have surrendered her very sovereignty over strips of her lands to be selected according to the whim or desire of a railroad corporation. Since, as conceded by petitioners (Brief, pp. 13-14), those acts had no legal effect upon the property affected their obvious purpose was merely to add the voice of the State in approval of the Government's plan to give encouragement to a private enterprise by providing rights of way over lands within her borders. The benefit that California would derive from the construction of the contemplated railroad must have been apparent to the State Legislature. It was in furtherance of this project that the acts were passed. It would be a false interpretation of these measures, designed as they were to promote the welfare of the State, to construe them as limitations upon the right of its people to travel its highways.

It may be well to point out that both the State enactments here referred to were prior to selection or occupation of any locations by the grantee railroad, and so prior to the time when those concerned had any appreciation of the nature of the problems which such extensive land grants would raise.

The argument of absolute and exclusive ownership

of the lands acquired has been advanced before in a Federal Court and caused Mr. Justice Brewer to remark (*Union Pac. R-R. Co.* v. *Leavenworth Ry. Co.*, 29 Fed. 728) that even though it be conceded that Congress had the power to establish a line across the center of a State it is clear that the assertion of such power was not contemplated in the Pacific land grants. It would seem that in petitioners' view any intercourse between the residents of the northern part of the State, with those of the southern part involving any encroachment across or along the railroad grant which separates these regions, would not only be unlawful but also unpatriotic.

It is not repudiation of the early legislation referred to to urge that the State never disclaimed all power in relation to the rights of way involved. Nor is it repudiation to assert that the State never intended to make the rights and conveniences of the public subservient to the claim of the railroad to a title inviolable even as against other consistent or superior public uses.

II.

The Act of July 1, 1862, *was not an unqualified grant vesting a title wholly beyond the power of Congress to modify; and the railroad holds subject to the conditions of the Act of March* 3, 1875.

The grant itself contains an express reservation of the right of the Government to alter, amend or repeal in the following language (12 Stat. 489, 497, Sec. 17):

"Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act."

No doubt the legislative body deemed such a reservation necessary to permit it to provide for exigencies that it could not then foresee, but which it knew were bound to arise. In the exercise of such an extensive power as that of granting a strip of land across the continent, Congress must have realized that the rights of many individuals and many states, as well as those of the Federal Government itself, might become involved (as indeed the country's judicial history of the period following those grants has proven); and it was thought advisable to leave the way open to a future Congress to adjust the conflicting rights of the public and of individuals as against those of the grantee railroads when and if the need should develop.

It would seem a reasonable assumption that some such situation was brought to the attention of Congress in 1875, for in that year was enacted legislation which required railroad companies whose lines passed through narrow defiles to permit the use of their rights of way by public highways necessary for public accommodation. Following is the pertinent portion of the Act of March 3, 1875 (18 Stat. 482, Sec. 2):

"That any railroad company whose right of way . . . passes through any canyon, pass or defile, shall not prevent any other railroad company from the use and occupancy . . . And the location of

> such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; . . ."

It is not necessary to rely upon the letter of the above act to support the decision in the present case. Rather does the present decision rest upon the principle announced. It may be that the Act of 1875 should be construed as a legislative determination of the construction to be placed upon the grant of 1862, rather than a qualification of the title thereby conveyed.

No decisions have been found which construe the Act of 1875 in connection with a public highway upon a railroad right of way. Petitioners have referred (Brief, pp. 17-20) to two cases which, it is claimed, lend support to their contention that to apply the principle of the Act of 1875 would be to impair their vested title, a result obviously inconsistent with the intent as well as the power of Congress.

However, we do not understand the cases referred to to stand for the doctrine contended for. The first of these cases is *Railway Co.* v. *Alling,* 99 U. S. 463. That case involved a dispute between two railroad companies, each of which claimed prior rights in a certain canyon. To ascertain the respective rights of the rival

lines, this Court examined the Act of 1875 to determine what effect it had upon the earlier Act of 1872, under which latter legislation the Denver Company claimed. It was concluded that the Act of 1875, coming as it did at a time before the Denver Company had taken actual possession of the canyon (as it was required to do in order to perfect its claim) qualified and limited the earlier contingent grant in such manner as to make the Denver Company subject to the qualifications contained in the later act, so that the intervening rights of the other line were protected. The question presented in the instant case was expressly left undecided. Whatever significance that opinion might otherwise have had for this case is effectually eliminated by the following statement appearing at page 480, shortly following the language quoted by petitioners (Brief, pp. 18, 19):

> "This conclusion renders it unnecessary that we should, in this case, consider whether Congress might legally have subjected the Denver Company, without its consent, to the provisions of the Act of March 3, 1877, had that company actually located and constructed its road in or through the Grand Canyon within five years after the passage of the Act of June 8, 1872."

When a court disclaims any intention to pass upon a proposition it seems idle to speculate upon what its theory might have been.

The other case cited, *U. S.* v. *D. & R. G. Ry.*, 150

U. S. 1, appears to be even more remote from the present case, and nothing therein contained can be considered inconsistent with the interpretation of the Act of 1875 which respondents contend for. The only thing claimed to be pertinent there is the comment upon Mr. Justice Harlan's opinion in the Alling case (*supra*). It was merely pointed out that the granting act of 1872 and the subsequent enactment of 1875 were not inconsistent with each other (150, U. S. 8), and that the two acts could and should be read together, and that there was nothing in the Alling case inconsistent with such a construction.

Petitioners' "controlling principle" (Brief, p. 20), as stated by Mr. Chief Justice Waite in the *Sinking Fund Cases*, 99 U. S. 700, 719 (to the effect that Congress may not impair vested rights derived through its own enactments), is undisputed. However, it is not applicable here. It may be noted that its pronouncement there was merely preliminary to an exposition of its inapplicability to the facts there under review.

In the absence of any direct authority for the true construction to be given the Act of 1875, we may consider this Court's views in regard to a later act which likewise had the effect of further restricting the limited fee conveyed to certain railroads by one of the land grant acts. The Act of June 24, 1912, (37 Stat. 138) confirmed and validated conveyances theretofore made

by the Union Pacific Railroad Company, and also provided that thereafter persons claiming portions of the unused right of way by adverse possession for the period and of the character prescribed by the laws of the State involved should be permitted to acquire and perfect titles so acquired.

In *Union Pacific R. R. Co.* v. *Laramie Stock Yards*, 231 U. S. 190, and *Union Pacific R. R. Co.* v. *Snow*, 231 U. S. 204, this court held that in view of the express language of the statute validating agreements and conveyances already made whereby the railroad had alienated unused portions of its right of way, the act must be given retrospective operation, but that, in the absence of the expression of a similar intention as to the adverse possession provision, only such rights as had commenced to run after the effective date of the act were contemplated. In each of those cases the prescriptive period had not elapsed since the enactment, and consequently the judgments supporting the titles asserted were reversed.

It is apparent that the Act of 1912 had the effect of limiting or qualifying the earlier grant in a manner more detrimental to the railroad's interest than that of the Act of 1875, and that the later act was a direct qualification of the previous act. Consequently, in the case at bar, the State Supreme Court was justified in concluding that if Congress could in 1912 have placed a direct limitation upon the earlier grant, it surely could

have done so in 1875. The opinion (R. pp. 131-134, fol. 197-199, 81 *Cal. Dec.* 662-663, 299 *Pac.* 81-2) treats this proposition fully, and no good purpose would be served by pursuing it further.

Under petitioners' theory, if the railroad may voluntarily alienate unused portions of their rights of way, others may gain rights therein by adverse possession (Brief, pp. 23-26). If this be true, then admittedly Congress has by the Act of May 29, 1920 (41 Stat. 621) further restricted the grant of 1862. For it was there provided:

> ". . . That all railroad companies to which grants for rights of way through the public land have been made by Congress, or their successors in interest or assigns, are hereby authorized to convey to any state, county or municipality any portion of such right of way to be used as a public highway or street; . . ."

If Congress had the power to impose these burdens in 1912 and 1920, certainly it had the same power in 1875.

III.

The title of the railroad derived from the Act of July 1, 1862, is subject to public rights obtained through adverse user commensurate with the police power of the State.

The case at bar is not concerned with the lack of authority of a land grant railroad to divest itself of title to a portion of its right of way by deed, by abandonment or by dedication; nor is it concerned with the

right of an individual to acquire prescriptive title or easements in such property. It may be conceded that in each of those instances no encroachment will be permitted as against the railroad. By contrast, this case involves the *public* right to use so much of the railroad's right of way as may be reasonably necessary under the peculiar circumstances, both geographical and historical, of the case.

The authorities cited by petitioners (Brief, pp. 26-31) may be readily distinguished when these distinctions are kept in mind. Thus, *Southern Pac. Co.* v. *Hyatt,* 132 Cal. 240, involved only the right of an individual to acquire by adverse user. Any dictum in that case concerning public rights, while perhaps correct as an abstract proposition, can have little weight in view of the extraordinary facts of the instant case. The Texas case (*Heilbron* v. *St. Louis S. W. Ry. Co.,* 52 Tex. Civ. App. 575, 113 S. W. 613) dealt with no such necessity as appears in the present case. The same is true of *Williams* v. *Atlantic Coast Line R. Co.,* 17 Fed. (2nd) 17, and *Holland Co.* v. *Nor. Pac. R. R. Co.,* 208 Fed. 598, 214 Fed. 920.

It is respondents' contention that the public, through its established state and county government, has, when the requirements of public necessity demand and under its power of eminent domain, the right to condemn an unused portion of a railroad right of way obtained by

Congressional grant for a longitudinal encroachment; that the necessity has been shown in the present case; that, the right to condemn being established, the correlative right to acquire by adverse possession follows and is necessarily commensurate with the extent of the police power. The pronouncements of this court and other Federal courts are not only consistent with this view, but lend strong support to it, though no case identical in facts to the one at bar appears to have been decided in a Federal jurisdiction.

The single case on the proposition of a lateral or parallel encroachment on a land grant right of way appears to be one decided by the Supreme Court of Washington in 1908. (*North Coast Ry.* v. *Northern Pac. Ry. Co.*, 48 Wash. 529, 94 Pac. 112). There the plaintiff railway sought to place its track for a limited distance through a pass or canyon parallel to and along the right of way of the Northern Pacific, which latter road held a grant from Congress similar to that under which petitioners here derived their right of way. The Washington court considered and relied upon many of the cases cited in the opinion of the California court in the present case (R. pp. 125-130, fol. 193-196, 81 Cal. Dec. 658-9, 299 Pac. 78-80), and held as follows: (94 Pac. 114):

> "It is true the most, if not all, of the last-cited cases related to crossings of other railways . . . whereas the tract here sought . . . is a longitudinal tract about three-fifths of a mile in length, to be

carved out of claimant's right of way. The principle as to the power of eminent domain is, however, the same in both cases, depending upon the necessities of the occupying railroad and those of the public service . . . *It is therefore held here that the petitioner may invoke the power of eminent domain to acquire a longitudinal part of claimant's right of way if the showing as to the necessities of the two companies in the interest of the public service is sufficient to warrant it.*" (Emphasis ours.)

Petitioners have attempted to distinguish the above case (Brief, pp. 24-26) upon the ground that the Washington court erroneously assumed that the right of way grant through an Indian reservation was ineffective until 1885 (i. e., until subsequent to the Act of March 3, 1875), and that consequently and in accordance with the doctrine of the Alling case, *supra*, the Northern Pacific took subject to the provisions of the subsequent legislation requiring joint occupation. It is pointed out in this connection (Brief, p. 25) that decisions of this court, later in point of time to the Washington case, have held that these land grants are effective upon Indian lands. But this is beside the point in view of the positive declaration in the above quoted excerpt. Moreover, as showing that the court placed no reliance upon the subsequent qualifying statute, the following statement is significant (94 Pac. 115):

"With this view it is unnecessary to examine the questi[on] discussed in the briefs as to whether the act of [1875] being subsequent to that granting the right o[f way], applies here."

The distinction respondents here urge between the rights of individuals to acquire rights in and over railroad rights of way has been clearly recognized by this court. In *Northern Pacific Railway Co.* v. *Townsend,* 190 U. S. 267, the court was at pains to explain that what was there said concerning the refusal to recognize the right of an individual to possession for private purposes had no application to the rights of the public under similar circumstances. In order that this proposition be clearly understood, it was said (190 U. S. 272):

> "Of course, nothing that has been said in any wise imports that a right of way granted through the public domain within a State is not amenable to the police power of the State. Congress must have assumed when making this grant, for instance, that in the natural order of events as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

In *Holland Co.* v. *Northern Pacific Ry. Co.,* 208 Fed. 598, the District Court in eastern Washington discussed the Townsend case, *supra,* and pointed out that (208 Fed. 602):

> ". . . it was not denied that the right of way granted through the public domain within a state was amenable to the police power of the state, . . ."

In confirming this decision the Circuit Court of Appeal for the Ninth Circuit made the following observations (*Holland Co.* v. *Northern Pac. Ry. Co.*, 214 Fed. 920, 926):

> "Public use implies an underlying necessity, and the fundamental consideration, therefore, is that of superior need . . . The needs to which the railroad company's right to exclusive possession must yield are such only as arise out of, or are connected with, the maintenance of the right of way and the operation of a continuous line of railroad thereon. In other words, the railroad company is authorized to make, and may be compelled to make, reasonable provision for those needs only which it is instrumental in creating, or which inhere in the very nature of an unbroken right of way."

The court proceeds to discuss the impossibility of condemning a portion of a railroad right of way for such uses as erection of a public building. In considering the opinion, it should be borne in mind that the question before the court was whether or not a public street through the flat lands of a townsite could be maintained along the railroad right of way. The question of public accommodation and necessity at issue in the present case was not presented. The court goes on to say (214 Fed. 926):

> "Upon the one hand, the implication is clear that Congress intended that the right of way should be held and used exclusively for railroad purposes, and upon the other, it is fair to assume, it was not desired that the use be in disregard of the rights and convenience of those who should take up their abode along its course. It must have been contem-

> plated that highway and other crossings would, in the very nature of things, be required, and in view of the self-evident need therefor, together with what must have been a common and well-understood practice of making provision for them in railroad operation, it is reasonable to suppose that the grant was made with the implied consent that ways of necessity, both public and private, might be laid out across the right of way at such places and under such conditions as would not unreasonably impair its usefulness for the purpose for which it was created."

Petitioners have said (Brief, p. 26) that this case "denies the power of the railway company to alienate a longitudinal strip of its congressional right of way for highway purposes." However, bearing in mind the physical facts and conditions heretofore adverted to in the Holland case as distinguished from those existing in the present case, the following passage in the opinion is highly significant (214 Fed. 926-7):

> "We do not say that a case is inconceivable where, for a limited distance, some concession may not properly be made for this or an analogous purpose; but the necessity must be great and the conditions unusual in the extreme to warrant it."

Upon the general proposition that the state may condemn a railroad right of way when required for public convenience and necessity, the following cases are believed to establish such right:

Union Pacific Railway Company vs. *Leavenworth*, 29 Fed. 728, wherein it is held that the plaintiff railroad company's right of way is not beyond the reach

of the State's power of eminent domain proceedings in the State courts;

Illinois Central Railroad Company vs. *Chicago, etc. Company*, 26 Fed. 477, wherein the plaintiff railroad's contention that it held its right of way grant as a public trust protected from the state's right of eminent domain was declared untenable;

Union Pacific Railway Company vs. *Burlington & Missouri Railroad Company, et al.*, 3 Fed. 106, wherein the court held that even though the railroad right of way grant should be conceded to be the land of the United States, it would be subject to the state's power of eminent domain;

Northern Pacific Railroad Company vs. *St. Paul, etc.*, 3 Fed. 702, wherein it was held that a charter granted to a railroad company by the United States government does not exempt its right of way from the operation of the laws of the state relative to eminent domain;

Northern Pacific Railroad Company vs. *Spokane*, 64 Fed. 506, wherein the court further extends this doctrine by holding that the railroad company claiming under a federal grant right of way could dedicate to the public all rights that the public might acquire by condemnation.

In view of the finding of the trial court in the case at bar to the effect that "the said highway through

Niles Canyon is necessary for public accommodation" (R., p. 30, fol. 51), and also the statement in the opinion of the State court that (R., p. 129, fol. 195, 81 Cal. Dec. 660, 299 Pac. 80),

> "the findings and the evidence show beyond question an imperative necessity for the Niles Canyon highway, because besides furnishing the sole means of ingress to the property situate along the railroad within the canyon, it serves as the only feasible way of uniting two important and well-populated regions of the state, and therefore is vital to their development and progress"

petitioners' criticism of the State court's opinion (Brief, p. 27) would seem unjustified.

Since the State of California and its duly authorized agencies must be conceded to possess the right to condemn for crossing purposes, and since it is evident that to restrict the public in this respect would be intolerable, it is submitted that the extension of this conceded doctrine to include longitudinal rights of way for highway purposes for limited distances only in those regions where the topography of the country makes it necessary for the public convenience that roads exist, is not a very great or unreasonable step. No departure from established law is involved. Indeed, the courts, in considering the general doctrine with relation to crossings, have foreseen and expressly provided in their opinions for the situation now presented by declaring, as above shown, that under proper circumstances longitudinal rights of way may be acquired. The same

fundamental principle which has moved the courts to read into the federal land grants a right whereby the states may condemn so much of the land given as may be necessary for crossings, requires that longitudinal rights of way be recognized where the facts justify it.

Particularly in a case such as the present will the court hesitate to announce a rule that will have the effect of isolating populous communities from each other. It will be noted that the cases last cited had to do with instances where it was sought to *acquire* rights in railroad rights of way, whereas here respondents have not initiated any proceedings looking to the acquisition of rights, but are merely seeking to maintain and defend rights that have been continuously exercised as such for a long period of time (since 1859) and which rights were not only prior in time to the occupation by the railroad (1867-8), but also prior to the granting act (1862).

After all, a longitudinal encroachment of the nature required in the case at bar does not differ in principle from a crossing. It might be termed a lateral crossing, as distinguished from the usual right angle crossing. The right of the public to travel from one terminus to another is exactly the same, and the public necessity quite as great. The right in either case is measured by the necessity of the public and not by the extent of the encroachment, so long at least as due regard is had for the necessities of the railroad.

While petitioners refrain from a direct declaration that the highway has interfered with the use of their right of way for railroad purposes, they convey that idea in calling attention to its proximity in certain places to their tracks (Brief, pp. 4 and 23). However, in proof of the lack of any disposition on the part of respondents to interfere with railroad operations, attention is directed to the abandonment proceedings of 1911, by which the county moved a considerable section of its roadway across the creek and off of the right of way. A comparison of Plaintiff's Exhibit No. 6 (inserted in the Record opposite p. 40), which shows the situation as of the time of trial (R. p. 40), with Defendant's Exhibit "D" (inserted opposite R., p. 84), shows this change just west of the location marked "Brightside" on the latter map.

It is submitted, therefore, that upon the theory of public necessity and public policy alone, respondents have acquired and are entitled to retain occupancy of the property in dispute, so long as the public use for highway purposes continues.

IV.

The highway involved was established and has been in use since 1859; *the necessity therefor is established; the United States Supreme Court will not undertake to examine a local question upon which the State court has spoken.*

Proceedings incident to locating, surveying, laying

out and adopting the disputed highway are set forth in the Record (pp. 54-62, fol. 90-100); and the trial court found (R. pp. 28-29, fol. 49-50):

> "... that the highway ... has existed in the location described since the year 1911, with the exception of a line change ...; that said road as it existed prior to said line change is known and identified as county road survey No. 4974; that said road has been in constant use for vehicular travel by the public continuously since the year 1911; that the said Niles Canyon through which said road No. 4974 extends is narrow and rugged; that in the year 1859 defendant Alameda County surveyed and laid out through the said Niles Canyon, under Survey No. 247, a county road which was in the same year declared by the Board of Supervisors of said county to be a public highway; ... that for more than sixty years there has existed with the knowledge of plaintiffs and their predecessors a highway for ordinary vehicular travel through Niles Canyon ..."

The proceedings taken in 1911 to change the course of the road appear in the Record (pp. 101-105, fol. 158-166); and likewise those in reference to certain slight changes made in 1865 (R. pp. 106-107, fol. 167-170).

Petitioners (Brief, pp. 35-38) dispute the fact that a road was ever opened along the line of the original survey, basing their claim upon the assertion that the latter was located entirely on the northern side of the creek, whereas the evidence establishes the presence of four crossings as early as 1904. Respondents suggest,

however, that the above findings, together with the following, are, at this stage of the case, conclusive (R., p. 29, fol. 50):

> ". . . the said highway did not exist throughout in its present location hereinabove particularly described prior to March 27, 1911, but that these parts of the old road No. 247 not expressly abandoned by the Board of Supervisors on said date and now included within the limits of County road No. 4974, are a part of the present traveled road . . ."

Furthermore, respondents do not understand that this court will consider the alleged error (designated number 5, Brief, p. 9) in view of the fact that the question whether Alameda County had ever established the Niles Canyon road as a public highway is patently a local issue upon which the State court has passed. In addition to the statement quoted in Petitioners' brief (p. 37), the State court, after stating the facts relative to the establishment of the road in question, held (R., p. 122, fol. 191, 81 Cal. Dec 656, 299 Pac. 77):

> "The proceedings above mentioned substantially complied with the requirements of the earlier statutes under which public highways were established (Stats. 1850, p. 200; Stats. 1855, p. 192); . . ."

The United States Supreme Court will examine the entire record, but state questions will be left to the decision of state courts in cases coming from those

courts. (*Yazoo, etc., Co.* v. *Mullins,* 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754.)

In *Donahue* v. *Vosper,* 243 U. S. 59, 37 S. Ct. 350, 61 L. Ed. 592, an action to quiet title, it was decided that the decision of a Michigan court was essentially a local question, involving an estimate of the evidence concerning the conduct of the parties, and that after disposing of that court's construction of a Federal decision respecting the same lands, the Supreme Court would not undertake to review other errors.

In *Sauer* v. *New York,* 206 U. S. 536, 27 S. Ct. 686, it was contended that a certain statute authorizing an obstruction sought to be enjoined was unconstitutional. The State court held that plaintiff had no remedy as against the public, and this court held such ruling to be binding upon it. After stating the contention that the state law denied plaintiff rights secured to him by the Federal Constitution, it was said (27 S. Ct. 688):

> "This contention presents the only question for our determination, and the correctness of the principles of local land law applied by the state courts is not open to inquiry here, unless it has some bearing upon that question."

And further (idem, p. 689):

> ". . . in defining the appellate jurisdiction the Chief Justice (Marshall, in *Cohen* v. *Virginia,* 6 Wheat. 264, 5 L. Ed. 257) expressly limited it to questions concerning the Constitution, laws, and treaties of the United States, commonly called

> Federal questions, and excluded altogether the thought that, under the congressional regulation, the jurisdiction included any power to correct any supposed error of the state courts in the determination of state law . . . It is enough to refer to *Murdock* v. *Memphis,* 20 Wall. 590, 22 S. Ct. 429, where, after great consideration, it was held that under the judiciary act, as amended to its present form, this court was limited to a consideration of the Federal questions named in the Constitution. This court, whose highest function it is to confine all other authorities within the limits prescribed for them by the fundamental law, ought certainly to be zealous to restrain itself within the limits of its own jurisdiction, and ought not be insensibly tempted beyond them by the thought that an unjustified or harsh rule of law may have been applied by the state courts in the determination of a question committed exclusively to their care."

Other cases upon the same proposition are collected in the note to Section 344 of Title 28, U. S. C. A., pp. 299-301.

Even though petitioners are not concluded by the findings and this court were to go into the merits of this assignment of error, it is believed that the assignment is unfounded.

The fact that there were several crossings of Alameda Creek in 1904 does not prove that the original survey, being entirely upon one side thereof, was not laid out as surveyed. The proceedings for relocation of the road had in 1865 (R., pp. 106-107, fol. 167-

170) indicate that alterations involving new crossings might well have been contemplated. The report of the surveyor states (R. p. 107, fol. 170):

> "The plat indicates the principal difficulties of the route, which runs most of the way, over table land above ordinary high water; except at the Creek crossings, which present nearly the same facilities for fording as heretofore."

It is quite evident that the previous route was not remote from the creek. The petition for relocation (R., p. 106, fol. 167) recites:

> "If a road was made upon the present surveyed route it would be destroyed by the first rise of the creek."

Petitioners' reference to the testimony of one of the old residents (Brief, p. 8) is to the effect that travel at certain points was "in the creek bed mostly." Mr. Buttner, another old resident stated (R., p. 77, fol. 124) that in the winter the flood waters sometimes caused closing of the road.

These witnesses traveled the road as early as 1862 or 1863 (R., p. 62, fol. 101, and R., p. 71, fol. 114). In view of the fact that their recollection places the road on the floor of the canyon and in or near the creek bed, there is nothing inconsistent with the idea that travel over the route originally surveyed may gradually have diverged slightly from the path originally outlined in order to avoid high water, fallen trees or other ob-

stacles. These changes, together possibly with others that were deemed desirable, later were coverd by the abandonment proceedings.

Petitioners' criticism (Brief, pp. 33-34) of the State court's reference to a "way of necessity" is wholly unjustified. It seems obvious that the technical doctrine of ways of necessity was not at all within the contemplation of the court. The only necessity the opinion is concerned with is that of the public, upon the basis of which an exercise of the power of eminent domain was held to be justified.

Petitioners' assertion (Brief, p. 35) that the topography of Niles Canyon in fact offers no obstacle to modern highway construction is met by the finding of the trial court heretofore referred to (R., p. 30, fol. 51), to the effect that "said highway through Niles Canyon is necessary for public accommodation." It must be apparent that, conceding that a road *could* be built along the walls of the canyon, such construction is possible but not feasible. As indicating what degree of necessity is requisite in matters of this kind, reference is again made to the Washington decision (*North Coast Ry.* v. *No. Pac. Ry. Co., supra*), where it was claimed that a sufficient showing on this point had not been made (94 Pac. 115):

> "It is true it is not shown to be impossible to construct . . . a line . . . on . . . claimant's right of way if a sufficient amount of money is ex-

pended and the increased dangers are not considered. It does appear, however, that it is not reasonably practicable to adopt either of the routes proposed by claimant when all the surroundings are considered . . . A reasonable public necessity is all that is required to authorize the condemnation of property devoted to a public use."

CONCLUSION

Petitioners are seeking equitable relief against the continued use by the public of a portion of their right of way solely upon the theory that the strip of land they claim is held by the railroad in a sort of rigid trust which prevents them from alienating title or being divested of the same in any manner whatsoever. Even assuming this proposition to be true, it would seem that the proper party to object to any encroachment upon the right of way, so long as it did not interfere with the use of the same for railroad purposes, would be the Federal Government for whom the railroad holds in trust. No complaint has been heard from the Federal Government. On the contrary, it would appear that the United States has recognized through its courts the necessity of permitting encroachments of the kind objected to in this case. In any event, respondents submit, that even if there were no road existing in Niles Canyon at the present time, the County of Alameda could, upon its showing of public convenience and necessity, condemn a right of way across and along the strip claimed by petitioners, such condemnation to be based upon the broad principle of

public policy and the police power of the State. Since this right to condemn exists, it follows that the claim of the railroad to the right of exclusive occupancy must fail, and the County of Alameda has acquired and is now entitled to an easement in the property in dispute.

It is respectfully submitted that no sufficient grounds for review of the proceedings of the State courts has been shown, that the decision of the latter should be affirmed, the Writ of Certiorari discharged and the present proceedings in this Court dismissed.

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